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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

EDGAR BAUTISTA,

Defendant and Appellant.

B202219

(Los Angeles County
Super. Ct. No. BA308981)

APPEAL from the judgment of the Superior Court of Los Angeles County.
Michael E. Pastor, Judge. Affirmed.

Kelly M. Cronin, under appointment by the Court of Appeal, for Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec, Supervising Deputy Attorney General, and Jason Tran, Deputy Attorney General, for Respondent.

INTRODUCTION

A jury convicted appellant of dissuading a witness by force or threat (Pen. Code, § 136.1, subds. (a)(2) & (c)(1))¹ and making criminal threats (§ 422). After a jury found true an enhancement allegation that appellant committed his crimes while released on bail in another case (§ 12022.1), the trial court sentenced him to four years in prison for dissuading a witness and two years for the bail enhancement. The sentence for the criminal threats conviction was stayed pursuant to section 654.

Appellant appeals contending the trial court abused its discretion and denied him due process and a fair trial by admitting into evidence a photograph of one of the homicide victims from appellant's earlier murder case. These contentions have no merit. Therefore, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Prosecution Case

One September night in 2004, Alejandro Gonzales was walking near James M. Wood and South Harvard Boulevards. He passed by two males (Sarabia and Ramirez) and witnessed appellant shoot them to death. Gonzales identified appellant as the shooter from a photo lineup that evening. Because Gonzales feared appellant and was afraid to testify against him, he was relocated to a new residence as part of witness relocation program.

Gonzales testified as witness against appellant in two murder trials. (Sup. Ct. Case No. BA272035.) Nonetheless, he refused to identify appellant as the shooter because Gonzales was afraid of him and his friends. After the first trial resulted in a mistrial, appellant was released on bail pending a new trial. During that time, Gonzales attended a prom in the City of Marina Del Rey. Appellant, who was also at the prom, stared at Gonzales for a long time and then approached him. Appellant angrily screamed at Gonzales for testifying against him in the murder case and

¹ All code references are to the Penal Code, unless otherwise indicated.

challenged Gonzales to a fight. Gonzales feared appellant would shoot him just like he had shot the other two victims, so he repeatedly denied he had been at appellant's trial. Appellant eventually left.

Gonzales's prom date, Martha Montano, identified appellant from a photographic lineup. She testified she saw appellant staring at Gonzales. Later, appellant approached Gonzales as they left the prom. Appellant angrily said he knew Gonzales from somewhere, but Gonzales denied it. Appellant challenged Gonzales to a fight and threatened to summon appellant's friends. Gonzales left the prom shaking in fear.

Afraid for his life, Gonzales refused to testify against appellant in the second murder trial. He told the police about the prom incident and identified appellant from a photographic lineup. But he refused to place his initials on the photo he identified because he was scared. Also, he would not accept a subpoena to appear at the trial. Nonetheless, he eventually agreed to testify in order to "do the right thing" for the murder victims' families. By the time of the trial in the present case, Gonzalez continued to be afraid of appellant.

Defense Case

Lizbeth Bautista, appellant's sister, testified she was with appellant and two other friends on the night of the prom. She saw Gonzales looking at them in an intimidating manner. Gonzales then pulled up his sleeves and showed the tattoos on his arms that said "something pride," but Lizbeth did not recall the first word of the tattoo. Lizbeth was concerned because appellant was out on bail, and she did not want him to get involved in a confrontation to defend her. She felt in danger and said Gonzales never seemed to be frightened of them.

Trial Court Ruling on Photographs

Prior to the impaneling of the jury in the present case, the prosecutor moved, under Evidence Code section 352 (section 352)², to admit two photographs pertaining to the prior murders. People's Exhibit No. 2 showed the place where victim Sarabia had fallen and a pool of blood on the sidewalk where his body had been. It also showed, a few feet away from that blood stain, victim Ramirez's dead body lying face up with his feet sticking out of a patch of ivy onto the sidewalk. Within the same exhibit was a small photo of a closer shot of Ramirez's body, with the upper half of his body on the ivy, the bottom half on top of the sidewalk. People's Exhibit No. 3 depicted a close-up shot of Ramirez lying face-up, with blood coming out of his ear and the back of his head. Small ants were on his face.

The prosecution argued the photographs were relevant in order for the jury to understand what Gonzales viewed at the time of the murders and, more importantly, to understand the fear he felt for his life after appellant's confrontation at the prom. The trial court agreed that Gonzales's state of mind was "critically important" and admitted the photographs over defense counsel's objection.

The court ruled, "[T]he extent of [Gonzales's] fear based upon what he may have seen and his reaction to it . . . I think are extraordinarily probative in this case. ¶ . . . [¶] One can't ignore the charges in this case, and again, the extent of the victim's fear and the basis for it are extraordinarily probative in this case. ¶ . . . [¶] This is not someone who allegedly witnessed a shoplifting case where someone says I'm going to get mad at you, you better not testify. This is someone who witnessed a double murder The qualitative difference is remarkable. And I think in a case of this sort, the probative value is extraordinarily high. The prejudicial value does not reach that level, and certainly the prejudicial effect does not substantially

² Section 352 provides, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

outweigh the probative value under Evidence Code section 352. I balanced and evaluated these factors”

DISCUSSION

The Trial Court’s Discretion

Under section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) “Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion ‘must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.’ [Citations.]’ [Citation.]” (*Id.* at pp. 1124-1125, original italics; *People v. Minifie* (1996) 13 Cal.4th 1055, 1070 [ruling under section 352 will not be reversed without clear showing of abuse].)

Specifically concerning photographs of a victim, their admission into evidence lies within the broad discretion of the trial court when a claim is made that they are unduly gruesome or inflammatory. (*People v. Ramirez* (2006) 39 Cal.4th 398, 453-454.) “ ‘The court’s exercise of that discretion will not be disturbed on appeal unless the probative value of the photographs clearly is outweighed by their prejudicial effect. [Citations.]’ [Citation.] ‘[A] court may admit even “gruesome” photographs if the evidence is highly relevant to the issues raised by the facts, or if the photographs would clarify the testimony’ [Citation.]” (*Id.* at p. 454, first and third brackets in original.)

The Trial Court Did Not Err by Admitting the Photographs

We have independently reviewed Exhibit Nos. 2 and 3 and conclude the trial court properly exercised its discretion in admitting them. The trial court ruled the photographs were highly probative because they explained Gonzales’s lack of

cooperation with the police and prosecution, and clearly illustrated the extent of the threat and intimidation he felt from appellant. The record shows the trial judge was conscious of his discretion and the danger that gruesome evidence could prejudice the jury. He ruled appropriately in admitting the evidence.

Appellant nonetheless contends the trial court erred in admitting People's Exhibit No. 3 because the photo had no relevance and was especially gruesome. Specifically, he argues it was not relevant concerning the issue of Gonzales's fear because he never saw the scene depicted in the photo, and it was overly gruesome or prejudicial because it showed ants crawling on the victim's face. We disagree.

The record indicates Gonzales walked right past Sarabia and Ramirez, who were walking in the opposite direction. Gonzales saw appellant shoot the two victims, saw them fall to the ground, and also saw blood spatter from the injuries, as depicted in the photographs, which he identified. In short, he witnessed the killing. Thus, a fair reading of the record indicates Gonzales did in fact see the substance of the images in the photographs.

Even assuming Gonzales did not view the precise image depicted in Exhibit No. 3, such a fact does not render the photograph inadmissible. The test to determine the admissibility of photographs is whether they are relevant, not necessary. (*People v. Harrison* (1963) 59 Cal.2d 622, 627.)³ It was enough that Gonzales witnessed a double murder and the resulting blood spatter, the essence of which was depicted in the photographs. Witnessing this graphic event, in conjunction with the confrontation at the prom, put Gonzales in such fear for his life that he initially refused to cooperate with police and the prosecution, even though he had already been placed in a witness relocation program. The photograph was highly relevant to show the jury the extent of Gonzales's fear and the reason for his actions.

³ “ ‘Relevant evidence’ means evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (Evid. Code, § 210.)

We similarly disagree Exhibit No. 3 was inadmissible because it showed ants on the victim's face. Even where photographic evidence is especially gruesome, the trial court does not abuse its discretion by admitting it if its probative value outweighs its probable prejudicial effect. (*People v. Mathis* (1965) 63 Cal.2d 416, 423; *People v. Carter* (2005) 36 Cal.4th 1114, 1168 [that photos of murder victims are graphic and disturbing does not render them unduly prejudicial]; *People v. Ramirez, supra*, 39 Cal.4th at pp. 453-454 [gruesome photo of victim with her eyes cut out admissible because highly relevant].)

The primary case appellant relies upon, *People v. Cavanaugh* (1955) 44 Cal.2d 252, is distinguishable. In that case, the court concluded testimonial and photographic evidence of the victim's body found "in a revolting condition, badly decomposed, and much eaten by vermin, and crawling with maggots" was unduly prejudicial. (*Id.* at pp. 266-267.) The victim's body in Exhibit No. 3 was not "badly decomposed" or "much eaten by vermin." While ants were indeed crawling on the victim's face, they are tiny and almost unnoticeable.

Appellant further argues the trial court should not have admitted Exhibit No. 3 because it was cumulative to Exhibit No. 2 and Gonzales's testimony that he was afraid of appellant. Again, we disagree. Even where photographic evidence is largely cumulative and thus might have been properly excluded, the trial court does not abuse its discretion by admitting it if it is relevant. (*People v. Love* (1960) 53 Cal.2d 843, 852-853; *People v. Michaels* (2002) 28 Cal.4th 486, 532 ["Although photographic evidence is often cumulative of testimonial evidence, that fact does not require its exclusion, '[b]ecause the photographic evidence could assist the jury in understanding and evaluating the testimony' "].)

Exhibit No. 2 only depicted the victim from a distance and did not show his injuries. In contrast, Exhibit No. 3 showed the victim's injuries and therefore more clearly illustrated why Gonzales was so afraid of appellant. For the same reason, we cannot say the photograph was inadmissible simply because it was cumulative to the testimony that Gonzales was afraid of appellant. The photograph was relevant and

helped to illustrate Gonzales's testimony. Accordingly, we find no abuse of discretion.

Finally, appellant argues reversal is necessary because the admission of Exhibit No. 3 denied him his right to constitutional due process, and without its admission a reasonable probability exists the jury would have returned a different verdict. This argument has no merit because even assuming the trial court erred, it was harmless under the standards of *People v. Watson* (1956) 46 Cal.2d 818, 836 and *Chapman v. California* (1967) 386 U.S. 18, 24.

As noted, the evidence showed Gonzales witnessed appellant commit a double murder. He was afraid of appellant but testified at the first murder trial that he had identified him in a photographic lineup. At a chance encounter at a prom, appellant confronted and angrily threatened Gonzales with physical harm for being a witness against him. Gonzales was left shaking in fear. He did not want to cooperate with police and would not accept a subpoena to testify at the second trial. Gonzales had every reason to take appellant's threat seriously and fear for his life because appellant was free from custody and Gonzales had already seen him brutally kill two people. (See *People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1343-1345 [defendant properly convicted under section 136.1 as long as words or action support inference he attempted by threat of force to induce person to withhold testimony]; *People v. Martinez* (1997) 53 Cal.App.4th 1212, 1218 [for conviction under section 422 defendant's threat may be gleaned from the words and all of the surrounding circumstances]; *In re David L.* (1991) 234 Cal.App.3d 1655, 1660 [section 422 does not require details such as the manner and time of execution of the threat].)

Consequently, contrary to appellant's contention, this is not a close case. Not only has appellant failed to show a reasonable probability that the jury would have reached a different result if Exhibit No. 3 had been included, but any error was harmless beyond a reasonable doubt. (See *People v. Cole* (2004) 33 Cal.4th 1158, 1199 [finding any error admitting photos harmless under state and federal constitutions].)

DISPOSITION

The judgment is affirmed.

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O'NEILL, J.*

We concur:

RUBIN, Acting P. J.

BIGELOW, J.

* Judge of the Ventura County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6, of the California Constitution.